

**U.S. Department of Labor**

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**Issue date: 16Oct2001**

*In the matter of*  
**Jessie Lee Gilbert**  
Claimant

v.

Case No. 2001 BLA 0481

**Clevenger Coal Company**  
Employer

And

**Director, Office of Workers'**  
**Compensation Programs**  
Party in Interest

**DECISION AND ORDER**  
***DENYING BENEFITS***

This case comes on a request for hearing pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §§901 *et seq.* (the Act) <sup>1</sup> This decision comes upon Claimant's request to modify, dated March 2, 2000, the denial of his third application for Federal Black Lung benefits. Director's Exhibit (hereinafter "DX") 17. Claimant initially applied for benefits in 1975, while he was still employed in the coal mining industry. DX 33-1. That claim was administratively denied by the Department of Labor ("DOL") on July 26, 1976, and again on August 22, 1980, based upon the Director's finding that there was no evidence of coal workers' pneumoconiosis or a totally disabling respiratory impairment. DX 33-12, DX 33-16. Claimant took no action until 1987, when he filed a duplicate Application for benefits. He alleged that he had not worked in the coal mining industry since 1980 when he "became disabled". DX 34-1. As no element of entitlement was proven, DOL again denied the claim. DX 34-18. The Director noted that no proof of coal mine employment had ever been submitted for consideration. *Id.* Again, claimant took no action in response to the Director's denial until 1998, when he filed a third Application for benefits. DX 1. The Department of Labor once again denied the claim, on the same grounds as before, but found claimant had established 2.36 years of employment. DX 13. Less than a week before the one year deadline for action on the denial expired, claimant submitted medical records from Dr. Joseph F. Smiddy's office, requesting modification of the denial of his second duplicate Application. DX 17. The Department of Labor once again denied the claim but subsequently scheduled an informal conference at claimant's request. DX 23, DX 25. The Director issued a Memorandum of

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<sup>1</sup> And the regulations at 20 C.F.R. Ch. VI, Subch. B (the Regulations).

Informal Conference - Denial on November 1, 2000. DX 28. The Director found that claimant had proven a total of 4.02 years of coal mine employment, and found that there was no opinion in the record supporting a finding of total disability due to coal workers' pneumoconiosis or coal dust exposure. Id.

Claimant requested a hearing, and a formal hearing was held in Abingdon, Virginia on July 24, 2001. DX 29. Claimant appeared with his lay representative from Stone Mountain Health Services, Ron Carson, and Lucy G. Williams, Esq., Street Law Firm, Grundy, Virginia, appeared on behalf of Clevinger Coal Corporation. There was no appearance by anyone on behalf of the Director.

After reviewing the issues, Director's Exhibits 1-36 and Employer's Exhibits ("EX") 1-6 were entered into the record without objection. The parties pre-hearing statements are also admitted. Claimant did not submit any additional documentary evidence but testified and was the only witness at trial. Post hearing, the record remained open, and both parties submitted briefs, which are hereby admitted into the evidence, along with the hearing transcript (hereinafter "Tr."). The parties have stipulated that Mr. Gilbert has one dependent, eligible for augmented benefits had he prevailed in this modification claim, his wife Maudie Gilbert (DX 6, Tr. 31).

### **Modification**

33 U.S.C. 922 provides:

[u]pon his own initiative, or upon the application of any party in interest, ... on the ground of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner, the deputy commissioner may ... review a compensation case ... in accordance with the procedure prescribed in respect of claims in section 919 . . . .

33 U.S.C. 922. As this claim constitutes a modification request, claimant has the initial burden of proving a material change in condition or a mistake in fact before the merits of the claim can be reached. Pursuant to 20 CFR §§ 725.309(d), if an earlier claim has been finally denied, subsequent claims "shall also be denied, on the grounds of the prior denial, unless the [adjudicating officer] determines that there has been a material change in condition....." This claim must merge with the prior claim and remain denied if claimant cannot establish that material change in condition has occurred.

### **Burden of Proof**

"Burden of proof," as used in this setting and under the Administrative Procedure Act<sup>2</sup> is that "[e]xcept

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<sup>2</sup>33 U.S.C. § 919(d) ("[N]otwithstanding any other provisions of this chapter, any hearing held under this chapter shall be conducted in accordance with [the APA]"); 5 U.S.C. § 554(c)(2). Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. §§ 901-950, is incorporated by reference into Part C of the Black Lung Act pursuant to 30 U.S.C. §§ 932(a).

as otherwise provided by statute, the proponent of a rule or order has the burden of proof". "Burden of proof" means burden of persuasion, not merely burden of production. 5 U.S.C.A. § 556(d)<sup>3</sup>. The drafters of the APA used the term "burden of proof" to mean the burden of persuasion. **Director, OWCP, Department of Labor v. Greenwich Collieries** [Ondecko], 512 U.S. 267, 114 S.Ct. 2251 (1994).<sup>4</sup>

The claimant bears the burden of establishing the following elements by a preponderance of the evidence: (1) the miner suffers from pneumoconiosis, (2) the pneumoconiosis arose out of coal mine employment, (3) the miner is totally disabled, and (4) the miner's total disability is caused by pneumoconiosis. **Gee v. W.G. Moore and Sons**, 9 B.L.R. 1-4 (1986)(*en banc*); **Baumgartner v. Director, OWCP**, 9 B.L.R. 1-65 (1986)(*en banc*).

A claimant has the general burden of establishing entitlement *and* the initial burden of going forward with the evidence. The obligation is to persuade the trier of fact of the truth of a proposition, not simply the burden of production, the obligation to come forward with evidence to support a claim.<sup>5</sup> Therefore, the claimant cannot rely on the Director to gather evidence.<sup>6</sup> A claimant, bears the risk of non-persuasion if the evidence is found insufficient to establish a crucial element. **Oggero v. Director, OWCP**, 7 BLR 1-860 (1985).

### Evidence

Mr. Gilbert is 52 years old and has not worked anywhere for more than twenty years. He testified that he receives Social Security disability due to back pain and breathing problems, and had not worked since 1980. (Tr., 16, 18). He indicated that several entries on his Social Security Earnings Record were incorrect, and that he previously had been notified that another

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<sup>3</sup> The Tenth and Eleventh Circuits held that the burden of persuasion is greater than the burden of production, **Alabama By-Products Corp. v. Killingsworth**, 733 F.2d 1511, 6 BLR 2-59 (11th Cir. 1984); **Kaiser Steel Corp. v. Director, OWCP** [Sainz], 748 F.2d 1426, 7 BLR 2-84 (10th Cir. 1984). These cases arose in the context where an interim presumption is triggered, and the burden of proof shifted from a claimant to an employer/carrier.

<sup>4</sup> Also known as the risk of nonpersuasion, see 9 J. Wigmore, **Evidence** § 2486 (J. Chadbourne rev.1981).

<sup>5</sup> *Id.*, also see **White v. Director, OWCP**, 6 BLR 1-368 (1983)

<sup>6</sup> *Id.*

individual in Tennessee had been fraudulently using his social security number. Id. 21-22. He testified that he worked in coal mine employment for twelve years and that Clevenger Coal Company was his last coal mine employer. He also testified that he had worked for them in excess of one year (Tr. 19-20, 24).

In 1975, Dr. Fleenor diagnosed asthma and chronic bronchitis, and specifically indicated that any disability claimant had was not due to black lung. DX 33-8. Claimant was examined on June 16, 1987 by Dr. Baxter in connection with his duplicate Application for benefits. DX 34-16. Dr. Baxter diagnosed asthmatic bronchitis with no significant respiratory impairment and coal workers pneumoconiosis based on positive x-ray interpretations submitted by other physicians. After this claim was filed, J. Randall Forehand, M.D. examined Mr. Gilbert for the Department of Labor in connection with his third Application for benefits on January 25, 1999. DX 9. Dr. Forehand indicated claimant had never smoked, and diagnosed chronic bronchitis which was not totally disabling. An obstructive ventilatory pattern was noted on pulmonary function studies (Id.). An X-ray taken January 25, 1999 was noted by Dr. Forehand to be negative for pneumoconiosis (DX 11). The same X-ray was read by Shiv Navani, M.D.; although he noted a profusion, (0,1), a diagnosis of pneumoconiosis was not made (DX 12).

In connection with his March 2000 modification request, Claimant submitted an examination report by Joseph F. Smiddy, M.D. dated August 9, 1999. DX 17. Dr. Smiddy diagnosed chronic bronchitis, pneumoconiosis, sinusitis, a deviated nasal septum, skin nevus of the right thorax and chest pain of skeletal origin. However, Dr. Smiddy did not provide any explanation for his diagnosis.

At the Department of Labor's request, John A. Michos, M.D. reviewed several items of evidence and submitted a letter to the Director dated June 5, 2000 regarding his conclusions concerning Claimant's pulmonary condition. DX 22. Dr. Michos explained that claimant's moderate obstructive respiratory impairment was secondary to asthma and unrelated to coal dust exposure or simple coal workers' pneumoconiosis. Although he referenced various chest x-ray interpretations in the record, he stated that it was doubtful that coal workers' pneumoconiosis played a clinically significant role in claimant's pulmonary impairment.

The Claimant also submitted an X-ray report from Michael Alexander, M.D. of a film taken January 14, 2000 (DX 17). This report shows that the Claimant has pneumoconiosis, with a reading of p/q, 1, 2. Id. The employer submitted the same films to four(4) physicians, none of whom found pneumoconiosis. DX 19, DX 20, EX 1, EX 3.

Moreover, pulmonary function studies performed February 1, 2000 at Stone Mountain Health Services were submitted. DX 17, DX 18. Richard F. Kucera, M.D., reviewed the studies and found them to be acceptable (DX 18). If the Claimant proved pneumoconiosis, the values may be qualifying.

Claimant was also examined by Gregory Fino, M.D. for the Employer in connection with his modification request. EX 5. Dr. Fino assumed twelve years of coal mine employment and diagnosed moderate obstruction with mild resting hypoxemia which he attributed to asthma. He opined that there was insignificant evidence to justify a diagnosis of simple coal workers' pneumoconiosis, particularly in light of normal total lung capacity and diffusion capacity values. Dr. Fino indicated that even if he assumed Mr. Gilbert had medical pneumoconiosis, claimant's disability could not be attributed to that disease. EX 5.

As stated above, the Claimant alleges that he worked about twelve years in coal mine employment; he last worked in 1980 (Tr. 11-13). He testified that he can not do anything as a result of lung problems (Id., 17). Dr. J.G. Patel, the Claimant's treating physician, prescribed a nebulizer and "breathing medication (Id., 25). He also sees Dr. Kabaria, who prescribed prednisone and oxygen (Id., 26, 28).

### Evaluation

A review of all of the evidence, including the Claimant's testimony, does not support a finding that coal workers' pneumoconiosis, even if present, contributed in any way to claimant's respiratory condition. He must prove that pneumoconiosis is a contributing cause to total disability. The Board requires that pneumoconiosis be a "contributing cause" to the miner's disability. *Scott v. Mason Coal Co.*, 14 B.L.R. 1-37 (1990) (*en banc*), *overruling Wilburn v. Director, OWCP*, 11 B.L.R. 1-135 (1988). The Fourth Circuit requires that pneumoconiosis be a "contributing cause" to the miner's disability. *Hobbs v. Clinchfield Coal Co.*, 917 F.2d 790, 792 (4th Cir. 1990); *Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 38 (4th Cir. 1990). In *Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241 (4th Cir. 1994), the Fourth Circuit concluded that "nonrespiratory and nonpulmonary impairments have no bearing on establishing total disability due to pneumoconiosis." Rather, the miner must demonstrate that he "has a totally disabling respiratory and pulmonary condition . . . and show that his pneumoconiosis is a contributing cause to this total disability."

The Claimant has submitted Dr. Alexander's opinion, based on an x-ray, that he has pneumoconiosis. Four board certified radiologists and "B" readers read the same X-ray and reach an opposite conclusion. DX 19, DX 20, EX 1, EX 3. The Board has held that a judge is not required to defer to the numerical superiority of x-ray evidence, *Wilt v. Wolverine Mining Co.*, 14 B.L.R. 1-70 (1990), although it is within his or her discretion to do so, *Edmiston v. F & R Coal Co.*, 14 B.L.R. 1-65 (1990). Other X-rays of record are negative. EX5, Exhibit, EX 2. No "reasoned opinion" has been proffered to show that the Claimant has pneumoconiosis.

I do not credit Dr. Alexander's opinion, as it is inconsistent with the rest of the probative evidence. X-rays taken June 15, 2001 were negative (EX 5). Pneumoconiosis is not shown from any of the recent X-rays. Because pneumoconiosis is a progressive and irreversible disease, it may be appropriate to accord greater weight to the most recent evidence of record especially where a significant amount of time separates the newer from the older evidence. *Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989) (*en banc*); *Casella v. Kaiser Steel Corp.*, 9 B.L.R. 1-131 (1986). The Fino X-ray was taken a year and a half after

the X-ray submitted with the request for modification. This evidence is not rebutted. Dr. Alexander was not asked to evaluate the other X-rays of record.

The pulmonary function studies presented may establish total disability (DX 17, EX 5).<sup>7</sup> A review of Dr. Smiddy's report shows that he failed to render an opinion that the Claimant is totally disabled as a result of pneumoconiosis (DX 17). A physician's report, which is silent as to a particular issue, is not probative of that issue. Dr. Fino, who is board certified in internal medicine and pulmonary medicine, opines that the Claimant may have total disability, but it is as a result of asthma (EX 5, EX 6).

The Claimant does not allege and has not proved that he is entitled to any of the presumptions at 20 CFR §§ 718.304, 718.305, or 717.306.<sup>8</sup> He alleges and I accept that he worked twelve years in coal mine employment.

A "documented" opinion is one that sets forth the clinical findings, observations, facts, and other data upon which the physician based the diagnosis. *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19 (1987). An opinion may be adequately documented if it is based on items such as a physical examination, symptoms, and the patient's work and social histories. *Hoffman v. B&G Construction Co.*, 8 B.L.R. 1-65 (1985); *Hess v. Clinchfield Coal Co.*, 7 B.L.R. 1-295 (1984); *Justus v. Director, OWCP*, 6 B.L.R. 1-1127 (1984). Indeed, a treating physician's opinion based only upon a positive x-ray interpretation and claimant's symptomatology was deemed sufficiently documented. *Adamson v. Director, OWCP*, 7 B.L.R. 1-229 (1984). A "reasoned" opinion is one in which the judge finds the underlying documentation and data adequate to support the physician's conclusions. *Fields, supra*. Indeed, whether a medical report is sufficiently documented and reasoned is for the judge as the finder-of-fact to decide. *Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989)(en banc).

However, even if I accept *arguendo*, that the Claimant has pneumoconiosis and that it is totally disabling, he has failed to show that pneumoconiosis caused total disability.

Dr. Fino determined that a chest x-ray is negative for pneumoconiosis. The diffusing capacity values are

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<sup>7</sup> With respect to the use of blood gas studies and pulmonary function (ventilatory) studies, "the Board consistently has held that pulmonary function studies and blood gas studies are not diagnostic of the etiology of the respiratory impairment, but are diagnostic only of the severity of the impairment." *Tucker v. Director, OWCP*, 10 B.L.R. 1-35, 1-41 (1987).

<sup>8</sup> Under §§ 718.305, if a miner was employed for fifteen years or more in one or more underground coal mines, and if other evidence demonstrates the existence of a totally disabling respiratory or pulmonary impairment, then there shall be a rebuttable presumption that such miner is totally disabled due to pneumoconiosis. 20 C.F.R. §§ 718.305(a).

normal. According to Dr. Fino, a normal diffusing capacity rules out the presence of clinically significant pulmonary fibrosis and, therefore, pneumoconiosis. Also, according to the report, there is no impairment in oxygen transfer “as this man does not become hypoxic with exercise. There is a disabling respiratory impairment present. From a respiratory standpoint, this man is disabled from returning to his last mining job or a job requiring similar effort. He is disabled due to asthma.” EX 5.

I find that Clevenger Coal Company is the responsible operator in this case. I also find that the Claimant is a “miner” and that he engaged in coal mine employment 12 years. However, I do not accept that the Claimant has met his burden under 20 CFR 718.202 et. Seq. To prove that he has pneumoconiosis and that it has caused total disability.

Although I accept that the Claimant is credible in that he can not work due to a respiratory problem, I do not accept that he is disabled due to pneumoconiosis. There is no basis in this record to discount Dr. Fino’s opinion. He is the sole physician who has evaluated all of the pertinent medical evidence. His opinion is substantiated in part by Dr. Michos’ opinion and similar findings in Dr. Forehand’s reports. Dr. Fino is well qualified and is the only examining physician who has spoken on causation. I accept that Dr. Fino rendered an opinion that is well documented and well reasoned. I accept that the spirometry values are qualifying solely as a result of the Claimant’s asthma. I accept that the Claimant has failed to establish a nexus of causation.

### Conclusion

A review of all of the evidence since December 15, 1998, the date of filing of this claim, discloses that even if the Claimant may have pneumoconiosis and may be totally disabled, he failed to prove that total disability was caused by pneumoconiosis. In addition to proving a material change in condition, all claimants under part 718 of the captioned Regulations bear the burden of proving the existence of pneumoconiosis as well as every other element of the claim. *Oggero, supra*; *Napier v. Director, OWCP*, 890 F.2d 690 (4<sup>th</sup> Cir. 1989). The failure to prove any single element precludes entitlement. *Robinson v. Pickands-Mather & Company*, 914 F.2d 35, 38 (4<sup>th</sup> Cir. 1990). The Claimant, at a minimum has failed to establish that total disability was caused by pneumoconiosis. Since the claimant has not met his burden of proof on material change in condition, modification is denied. *Director, OWCP v. Greenwich Collieries*, 114 S.Ct. 2251 (1994).

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Daniel F. Solomon  
Administrative Law Judge

**Notice of Appeal Rights:** Pursuant to 20 C.F.R. §725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within 30 days from the date this decision is filed with the District Director, Office of Worker’s Compensation Programs, by filing a notice of appeal with the Benefits Review Board, ATTN: Clerk of the Board, Post Office Box 37601, Washington, DC 20013-

7601. See 20 C.F.R. §725.478 and §725.479. A copy of a notice of appeal must also be served on Donald S. Shire, Esquire, Associate Solicitor for Black Lung Benefits. His address is Frances Perkins Building, Room N-2605, 200 Constitution Avenue, NW, Washington, DC 20210.